BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRENT A. HOWARD	)	
Claimant	)	
VS.	)	
	)	Docket No. 227,270
MARK HILL d/b/a A. F. HILL CONTRACTING	)	
Respondent	)	
Uninsured	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant and respondent appeal from an Award entered by Administrative Law Judge Bryce D. Benedict on January 4, 1999. The Appeals Board heard oral arguments on July 28, 1999.

APPEARANCES

Chris Miller of Lawrence, Kansas, appeared for claimant. Jeff Cooper and Chris N. Cowger of Topeka, Kansas, appeared for respondent. Eugene C. Riling of Lawrence, Kansas, appeared for the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award and adopted the stipulations listed in the Award.

ISSUES

Claimant contends the ALJ erred in entering an award based upon a 13.5 percent scheduled injury to the leg and also calculating claimant's average weekly wage. Respondent contends the ALJ erred in finding respondent had sufficient payroll to come within the mandatory coverage provisions of the Act and, if the Act applies to the claim, in finding respondent was financially able to pay the award. Accordingly, the issues for review are:

(1) Are the parties covered by the Kansas Workers Compensation Act? If so,

(2) Is respondent financially able to pay compensation?

(3) What is claimant's average weekly wage?

(4) What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented, and for the reasons explained below, the Appeals Board finds that the Award should be modified to an 11% permanent partial disability based upon a general body disability but should otherwise be affirmed. Except for those that may conflict with the findings and conclusions expressed herein, the findings and conclusions of the ALJ are affirmed and adopted by the Board.

Respondent is a construction contracting company owned by Mark Hill. A. F. Hill Contracting primarily does residential remodeling jobs. At the time of claimant's injury, respondent had three crews working - a roofing crew, a painting crew and a remodeling crew.

On August 21, 1997 claimant was involved in a work related motor vehicle accident that resulted in injury to his left hip and chest. The left hip injury was an open penetrating wound. He had a left anterior rib fracture of rib number 9. On the day of injury, claimant underwent surgical exploration and closure of the penetrating left hip wound by plastic surgeon Dr. Thellman at Lawrence Memorial Hospital.

A co-worker, Justin Hall, was the driver of respondent's vehicle when the accident occurred. Claimant was a passenger. Mr. Hall testified that he had worked for respondent since September 1996 and was paid $7.00 per hour. During the six months before the accident Mr. Hall worked 45 to 48 hours per week. He was always paid in cash.

Aaron McDaniel was another passenger in the vehicle when the accident occurred and likewise was employed by respondent primarily as a roofer. He was sometimes paid by the hour at the rate of $9.00 an hour and sometimes paid by the square. For a low pitch roof he was paid $10.00 per square and if the roof was over a nine pitch he received $15.00 per square. Mr. McDaniel worked between 40 and 50 hours per week. He usually worked six days a week and was always paid in cash. Mr. McDaniel believed respondent had about five people working on its roofing crew, including Brent Howard and Justin Hall. According to Mr. McDaniel, respondent always had jobs lined up and, at the time of the accident, respondent had between five and ten jobs waiting.

Claimant was likewise paid in cash by respondent. He was usually paid at the rate of $9.00 per hour but sometimes was paid by the square.

Mark Hill is the sole proprietor of A. F. Hill Contracting. He has operated the business for 11 years doing miscellaneous work on residential homes. Roofing is not the main part of his business. For a time he contracted with another business to do his roofing work until that contractor went out of business. Mr. Hill said he paid his roofers $9.00 per hour or $9.00 per square with an additional $5.00 a square for steep roofs. He acknowledged that he paid his workers in cash and did not withhold taxes or social security from their pay. Mr. Hill alleges that claimant was an independent contractor but respondent secured the jobs, told claimant what jobs to work and supplied any tools claimant needed. Mr. Hill also owned the vehicle involved in the accident but rented it to claimant and Justin Hall for 32 cents a mile. Mr. Hill also described Justin Hall as an independent contractor. According to Mr. Hill, Brent Howard and Justin Hall were the only roofers working for him during the first half of 1997. He did not carry workers compensation insurance because he did not know he needed it.

Schedule C to respondent's 1997 federal tax return shows gross receipts as $92,731. Line 27 lists other expenses at $24,125 including subcontractor expenses of $21,005.

The employer's right to direct and control the method and manner of doing the work is the most significant aspect of the employer/employee relationship. Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416, 416 P.2d 771 (1966). Clearly, Mr. Hill both had and exercised his right to control and supervise claimant's work. Furthermore, construction work, including remodeling, painting and roofing were the very nature of respondent's business. Accordingly, the Board finds claimant was an employee of respondent, not an independent contractor.

For claimant to be eligible for workers compensation benefits, he must establish that respondent had sufficient payroll to come under the Act. K.S.A. 1997 Supp. 44-505(a) provides:

> [T]he Workers Compensation Act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:
>
> (2) any employment . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection.

Based upon the record presented, and in particular the finding that claimant was just one of several employees working for respondent in 1997, it would be reasonable for Mr. Hill to conclude his gross annual payroll for 1997 would exceed $20,000.

If claimant was a full-time hourly employee his average weekly wage would be computed in accordance with K.S.A. 44-511(a)(5). That subsection states in pertinent part:

> The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.

But claimant worked sporadically and was paid only in part by the hour. He was also paid by the square, which is by his output as a roofer.

Claimant and the Fund offer variations for computing claimant's average weekly wage under subsection (b)(5) of K.S.A. 44-511. That subsection provides a method for computing the average weekly wage of employees paid on any basis other than by the week, month, year, or hour:

> If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection.

In the Board's view, neither subsection fits the present circumstances precisely. Nevertheless, the Appeals Board concludes that the provisions of subsection (b)(5) should be applied. Application of this subsection more accurately reflects the amount he actually earned. In addition, in accordance with the language of subsection (b)(5), the claimant's total wage is not "fixed by the week, month, year or hour . . . ."

If claimant's pre-injury average weekly wage is computed in accordance with subsection (b)(5), he had an average weekly wage at the time of the accident of $160.73. This wage is calculated by dividing the total amount earned for the 26 weeks preceding the accident, or $3,536.00, by the number of weeks claimant actually worked during those 26 weeks. The ALJ found this to be not more than 22 weeks, and the Board agrees. The result is an average weekly wage of $160.73.

Dr. William A. Bailey is a board certified orthopedic surgeon. He first saw claimant on December 2, 1997, on referral from counsel for the Fund. He found claimant to have atrophy and significant weakness in the muscles around his hip and recommended physical therapy. He last saw claimant on April 2, 1998 at which time he rated the cosmetic deformity and injury to the muscles in and around the hip from the laceration at 2 percent of the body as a whole based on the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment. He recommended restrictions of "probably never lift in excess of 50 pounds because of this and probably with the damage to the muscles in his buttock he probably would have difficulty working on a ladder, perhaps might be some danger working high places, you know, unless you had a flat surface to stand on." He concluded claimant could not work as a roofer unless on a flat surface. However, claimant could paint but not on a ladder. Dr. Bailey's impairment rating did not include the rib fracture because he was unaware of it. He also did not include any impairment for pain. Over the course of treatment, claimant's gait had improved to the point where it was fairly normal on level ground. Although claimant had gained strength he did not regain much mass and, in his opinion, claimant's buttocks will never be symmetrical due to muscle loss. Dr. Bailey also agreed with the restrictions recommended by Dr. Bieri.

Dr. Peter V. Bieri examined claimant on June 8, 1998, at the request of claimant's attorney. Dr. Bieri is a Fellow with the American Academy of Disability Evaluating Physicians. He found claimant to have sustained a 25 percent left lower extremity impairment and a 1 percent whole person impairment attributable to the rib fracture and thigh wound. The 25 percent lower extremity rating translates to a 10 percent whole person impairment. This combines with the 1 percent whole person impairment for a whole body rating of 11 percent. Dr. Bieri arrived at these ratings in a manner consistent with the Fourth Edition of the AMA Guides. He recommended restrictions of the medium physical demand level, occasional lifting up to 50 pounds, frequent lifting not to exceed 20 pounds and no more than 10 pounds constant lifting, with no climbing or balancing. Stooping, kneeling and crouching should be performed no more than frequently within the weights described. He advised claimant not to work on anything other than a flat roof because of his limited ability to climb, balance, and stand on uneven or pitched surfaces. Based upon the tasks list prepared by claimant and his attorney, Dr. Bieri opined claimant had lost the ability to perform 60 percent of those work tasks.

In this instance the Board finds Dr. Bieri's rating to be the more credible of the two opinions in evidence. Therefore, the Board adopts the rating given by Dr. Bieri and finds

claimant has suffered an 11 percent impairment to the body as a whole as a result of the August 21, 1997 accident.

Because his is an "unscheduled" injury, claimant's entitlement to permanent partial general disability benefits is governed by K.S.A. 1997 Supp. 44-510e:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The above statute, however, must be read in light of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that the employer offered that paid a comparable wage. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

After considering the record, the Appeals Board finds claimant did not make a good faith effort to find appropriate work. Therefore, Copeland limits claimant's wage loss to the difference between his pre-injury average weekly wage and his post-injury wage earning ability.

Even though claimant's condition restricts the number of jobs that he can perform, claimant is capable of earning a comparable wage. Given claimant's medical restrictions and physical limitations, the Appeals Board finds his wage earning ability is at least minimum wage, or $5.15 per hour. There are no restrictions on the number of hours claimant can work. A 40 hour work week at $5.15 per hour would yield a weekly wage of $206, which exceeds claimant's average weekly wage with respondent. Therefore, under K.S.A. 44-510e, claimant is not eligible for a work disability.

Finally, there is the issue of whether respondent is financially able to pay compensation. Claimant and the Fund both argue that the award should be entered against respondent. Noting respondent's large cash flow, the ALJ found respondent capable of paying the size of award he entered. The Board agrees. The amount of the modification to the ALJ's award by this order is not sufficient to alter that conclusion.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated January 4, 1999, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Brent A. Howard, and against the respondent, Mark Hill d/b/a A. F. Hill Contracting, for an accidental injury which occurred August 21, 1997, and based upon an average weekly wage of $160.73 for 34.57 weeks of temporary total disability compensation at the rate of $107.16 per week or $3,704.52, followed by 43.5 weeks at the rate of $107.16 per week or $4,661.46, for an 11% permanent partial general disability, making a total award of $8,365.98, and is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board approves and adopts the other orders entered by the Administrative Law Judge not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of January 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Lawrence, KS
Chris N. Cowger, Topeka, KS
Eugene C. Riling, Lawrence, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director